No. 77-926

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALDINE G. CANNON, PETITIONER

v.

THE UNIVERSITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-2 to A-21) is reported at 559 F.2d 1063. The opinion on rehearing (Pet. App. A-22 to A-34) is reported at 559 F.2d 1077. The memorandum of decision of the district court is reported at 406 F. Supp. 1257.[1]

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[1] The district court's memorandum is not reproduced in either the appendix to the petition or the Appendix in this Court.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The court's opinion on rehearing was issued on August 9, 1977. A timely petition for rehearing was denied on October 3, 1977. The petition for a writ of certiorari was filed on December 28, 1977, and granted on July 3, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

QUESTION PRESENTED

Whether a private person may sue a private recipient of federal financial assistance to enforce the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

STATEMENT

Petitioner initially brought these actions against the private respondents, the University of Chicago, Northwestern University, and various individual officers of those institutions. She later joined as "additional parties" the Secretary of Health, Education, and Welfare and the Region V Director of HEW's Office for Civil Rights.[2] Petitioner alleged that she had been discriminatorily denied admission to respondents' medical schools on the basis of sex, in violation of Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681(a).[3] Petitioner sought injunctions directing respondent universities to reevaluate her medical school applications and to admit her to medical school. She also sought declaratory relief and damages. Alternatively, she asked the district court to compel the Secretary to act favorably in response to her administrative complaints.[4]

The district court dismissed petitioner's suits for failure to state a claim upon which relief could be

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[2] Petitioner's amended complaints joined the federal parties in an "unaligned" capacity. The complaints stated (A. 5): "[Petitioner] believes the Secretary and the Regional Director may be aligned as plaintiffs in this case and, unless the context otherwise requires, said officials are not included in the term 'defendants' as used herein."

[3] Petitioner also alleged violations of several other federal statutes (see Pet. App. A-4). She does not pursue these allegations here.

[4] Petitioner stated that she filed written complaints with the Secretary and Regional Director five months before her amended district court complaints, but that "no investigation or related administrative action has been taken" (A. 16). She asked for an injunction "prohibiting the Secretary and the Regional Director from continuing to fail to investigate promptly and take appropriate related administrative and enforcement actions, including conciliation and efforts to effect voluntary compliance" (A. 19).

granted (406 F. Supp. 1257).[5] The court held, *inter alia*, that Title IX does not authorize a private right of action against recipients of federal financial assistance (*id.* at 1259). The court also held that, since HEW had scheduled an investigation in response to petitioner's sex discrimination complaint, available administrative remedies had not been exhausted and agency action was not final for purposes of judicial review (*id.* at 1260).

The court of appeals affirmed (Pet. App. A-1 to A-21). Relying heavily on the administrative enforcement scheme provided in Section 902 of the Education Amendments, the court held that "construing Title IX to provide a private cause of action before the administrative remedy has been exhausted would be to violate the intent of Congress" (Pet. App. A-12 to A-13).[6] The court stressed that the legislative history of Title IX contains no mention of private suits as a permissible means of enforcement. In the court of appeals' view, recent decisions of this Court[7] "teach[] * * * that a private cause

[5] The reported opinion deals only with the complaint against the University of Chicago and its officers. The complaint against Northwestern University was subsequently dismissed in reliance on the earlier opinion.

[6] Read as a whole, the court of appeals' opinion plainly reveals an intention to deny the existence of any private right of action for an individual complainant under Title IX, not simply to postpone private litigation until a complainant has attempted unsuccessfully to obtain relief through administrative channels.

[7] *Cort* v. *Ash*, 422 U.S. 66 (19[illegible]); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453 (1974).

of action should not be lightly implied under a statute where Congress has not specifically provided one—especially where Congress has provided for other means of enforcement" (*id.* at A-15). The court stated, however, that Title IX might permit private litigation "challenging wholesale sexual discrimination against a large number of men or women by a particular educational institution" (*id.* at A-16). The court made this observation in response to petitioner's argument that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4, and that Title VI provides a private right of action for victims of racial discrimination in federally funded programs. Petitioner cited earlier decisions apparently approving federal private suits under Title VI,[8] but the court of appeals distinguished these cases on the ground that they each "involved an attempt by a large number of plaintiffs to enforce a national constitutional right" (Pet. App. at A-12). The court ruled that the cases cited "do not give any real support to [petitioner's] argument that we must infer an individual right of action under Title IX in favor of a person who has a grievance based upon sexual discrimination against a private educational institution receiving government funds" (*ibid.*).

After the panel issued its original opinion, Congress passed the Civil Rights Attorney's Fees Award

[8] *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

Act of 1976, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988). In pertinent part, that statute authorizes the award of attorneys' fees to the prevailing party in actions brought to enforce the provisions of Title IX. Principally in order to give the parties an opportunity to discuss the possible implications of the Attorney's Fees Awards Act, the court of appeals granted rehearing limited to the question "whether a private right of action lies under Title IX" (Pet. App. A-23). On rehearing, the federal respondents supported petitioner.[9] Nevertheless, the panel adhered to its original holding that "implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme" (Pet. App. A-29).

The court reiterated its view that "Congress' express provision of a sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to exclude any private judicial remedies for violations of Title IX other than the judicial review mechanism Congress made available to private parties in the statute" (Pet. App. A-32). The court acknowledged that it might

[9] As reflected in a September 1974 letter from the Assistant General Counsel of HEW (Pet. App. A-36 to A-38), the Secretary's views on rehearing corresponded with the longstanding HEW position regarding Title IX. The failure of the federal respondents to endorse this position earlier in this litigation is attributable to communication lapses between national and regional HEW offices, not to any eleventh hour policy shift.

take a different view of the matter if the available administrative remedies had proven "wholly inadequate" to the task of protecting the rights guaranteed by Title IX. On the record in this case, however, the court remained unpersuaded that a private right of action is necessary to effectuate the purposes of the legislative scheme (*ibid.*). After canvassing the legislative history of the Attorney's Fees Awards Act, the court concluded that the Act's explicit inclusion of Title IX is not evidence of a pre-existing congressional intent to create a private right of action under that statute, but rather "was intended merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX" (*id.* at A-27). Finally, the court commented further on cases cited by petitioner in support of her argument that a private right of action has been recognized under Title VI of the Civil Rights Act and that private suits similarly should be permitted under Title IX, since the latter statute was specifically patterned on the former. The court stated that, in its reading, all the cases cited actually involved suits against public entities under 42 U.S.C. 1983, and therefore did not address the question whether an implied private right of action lies directly under Title VI (Pet. App. A-31 n.6, A-33 to A-34).

INTRODUCTION AND SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 prohibits sex discrimination in many federally

funded education programs. Section 901 of the Amendments, 20 U.S.C. 1681, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." Section 901 then lists a number of exceptions to which this general provision does not apply. None of these exceptions is relevant here, and Section 901(a)(1) makes clear that the prohibition against discrimination on the basis of sex is intended to cover professional school admissions.[10]

Section 902 of the Amendments, 20 U.S.C. 1682, establishes an administrative enforcement scheme under which funding agencies may terminate or refuse to grant federal financial assistance to educational institutions that discriminate on the basis of sex in violation of Title IX. Under this scheme, funding agencies are directed to issue rules and regulations designed to effectuate the provisions of Section 901. Such rules and regulations may not become effective unless and until approved by the President. Once the rules and regulations have received such approval, compliance may be effected either by the termination or refusal of funds or by "any other

[10] Section 901(a)(1) states: "[I]n regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."

means authorized by law." Section 902 provides, however, that no such enforcement action shall be taken "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." Section 902 further provides that federal funding shall not be refused or terminated without "an express finding on the record, after opportunity for hearing," that the recipient has not complied with Section 901 or its implementing regulations. Finally, Section 902 states that no funding termination or refusal shall become effective until 30 days after the relevant congressional committees have received reports from the funding agency explaining "the circumstances and the grounds for such action."

Section 903 of the 1972 Amendments, 20 U.S.C. 1683, provides for judicial review of any department or agency enforcement action taken under Section 902. Section 903 explicitly states that in the case of a refusal or termination of funds "not otherwise subject to judicial review, * * * any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with [the Administrative Procedure Act], and such action shall not be deemed committed to unreviewable agency discretion * * *."

The question presented in this case is whether a private person who allegedly has been the victim of

sex discrimination in a federally funded education program may sue to enforce Title IX's prohibition against such discrimination. The federal respondents support petitioner on this issue for several reasons.

1. First, *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), found an implied private right of action under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973c, a statute whose criti l language is similar to that used in Section 901 of the 1972 Education Amendments. This Court held that private suits under Section 5 would assist the Attorney General in carrying out his enforcement responsibilities under the Act and would help ensure that citizens in jurisdictions covered by the Act are not deprived of their right to vote by virtue of a changed "standard, practice, or procedure with respect to voting" that has not received the preclearance required by Section 5. Similarly, private suits under Title IX would assist funding agencies in fulfilling their statutory obligation to provide federal financial assistance only to those educational programs that do not discriminate on the basis of sex. At the same time, a private right of action under Title IX would enable individual participants or prospective participants in federally funded education programs to vindicate their right to be free of such discrimination. *Allen* demonstrates that the administrative enforcement mechanism in Section 902 of the Education Amendments should not preclude private suits under Title IX. The Voting Rights Act

of 1965 explicitly authorized the Attorney General to bring suit to enforce Section 5. See 42 U.S.C. 1973 j(d). The Act was silent about private litigation. Yet this Court concluded that private persons should be permitted to sue lest the guarantees of Section 5 "prove an empty promise" (393 U.S. at 557). Like considerations support implication of a private right of action under Title IX.

2. The result indicated by *Allen* is also the outcome suggested by a review of the language, legislative history, and judicial interpretation of several other statutes enacted before and after Title IX. Although the contemporaneous legislative history of Title IX itself does not itself contain clear evidence of congressional intent to create or deny a private cause of action, evidence gleaned from a variety of other sources does suggest that Congress intended to permit enforcement through private litigation when it enacted Title IX in 1972.

a. Title IX was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and private persons may sue to enforce Title VI. In *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), four Justices acknowledged that private actions may be maintained under Title VI and four others assumed *arguendo* that such actions are proper. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court granted relief in a private suit under Title VI, and petitioners' right to bring the action was not challenged. Moreover, numerous lower federal courts have either held or assumed that

Title VI does create a private right of action. Some of these cases were decided before Congress passed Title IX. See, *e.g.*, *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967). In enacting that legislation in 1972 and patterning it after Title VI, Congress acted against a background of judicial approval of private suits under the 1964 law. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988), provides further evidence of the congressional understanding that private suits may be maintained under both Title VI and Title IX. The Act authorizes an award of attorney's fees to the prevailing party in suits to enforce Title VI, Title IX, and a number of other federal statutes. Although the Act itself does not create a cause of action under Title IX, its language and legislative history demonstrate that many members of Congress assumed such a cause of action already exists.

b. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against the handicapped in federally funded programs. The statute's language is very similar to that used in Title VI and Title IX. Nothwithstanding the fact that Section 504 does not mention the possibility of enforcement through private litigation, a congressional committee report accompanying clarifying amendments passed one year after the Rehabilitation Act explicitly states that Section 504 "permit[s] a judicial remedy through a private action." S. Rep.

No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). The report further states that Congress intended implementation of Section 504 to follow the models of Title VI and Title IX. This Court has directed a lower federal court to decide a Section 504 claim in a private suit (see *Campbell* v. *Kruse*, 434 U.S. 808 (1977)), and other federal courts have expressly approved private actions under Section 504 (see *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977), and cases there cited). These decisions, together with the language and legislative background of Section 504, support implication of a private right of action under Title IX.

c. Title III of the Older Americans Amendments of 1975, 42 U.S.C. (Supp. V) 6101 *et seq.*, prohibits age discrimination in federally funded programs. Section 303 of the Amendments states this general prohibition in language nearly identical to that used in Title VI and Title IX. As part of a legislative compromise, Congress chose to make administrative enforcement, under regulations issued by the Secretary of Health, Education, and Welfare and the heads of other funding agencies, the exclusive remedy under Title III. Section 305(e) of the 1975 Amendments explicitly establishes the exclusivity of administrative remedies under Title III. The lack of any similar provision in Title IX indicates that Congress did not wish to confine Title IX enforcement efforts to the administrative fund termination procedures described in Section 902.

3. A review of the four relevant factors enumerated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), demonstrates that private suits should be permitted under Title IX. That statute was intended to eliminate sex discrimination in federally funded education programs. In particular, it was designed to prohibit discrimination against women. Petitioner is thus a member of the class of persons for whose especial benefit Title IX was enacted. Second, although direct contemporaneous evidence of Congress' intent to create a private right of action under Title IX is lacking, there is also no evidence of any legislative intent to deny such a right. *Cort* specifically recognized that where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action" (*id.* at 82). Third, enforcement through private litigation is consistent with the legislative purpose underlying Title IX. Administrative enforcement of the statute is a huge undertaking and is not well suited to redress injuries suffered by individual victims of sex discrimination. Private suits would complement the administrative fund termination procedure and enable those who have been denied the benefits of federally funded education programs on the basis of sex to vindicate their rights under Title IX. Finally, enforcement of Title IX is a uniquely federal concern, not traditionally relegated to state law. The fourth criterion listed in *Cort* therefore supports implication of a private right of action under Title IX.

ARGUMENT

PRIVATE PERSONS MAY SUE TO ENFORCE THE ANTIDISCRIMINATION PROVISIONS OF TITLE IX

I

THIS COURT'S DECISION IN *ALLEN* v. *STATE BOARD OF ELECTIONS* SUPPORTS IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX

Title IX of the 1972 Education Amendments provides that no person may be excluded from participation in a federally funded education program on the basis of sex. The Voting Rights Act of 1965, 42 U.S.C. (and Supp. V) 1973 *et seq.*, provides that no person may be denied the right to vote on the basis of race or color. To implement this general prohibition, Sections 4 and 5 of the Act, 42 U.S.C. (Supp. V) 1973b and 1973c, together provide that certain covered jurisdictions may not enforce changes in their standards, practices, or procedures with respect to voting unless those changes have first been precleared by the United States District Court for the District of Columbia or the Attorney General. Section 5 states that, in jurisdictions included within the coverage formula of Section 4, "*no person shall be denied* the right to vote for failure to comply" with a voting change that has not been precleared (emphasis added). Neither the Voting Rights Act nor Title IX explicitly authorizes private actions to enforce its provisions.

Nevertheless, in *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-557 (1969), this Court held that a private citizen may sue to enjoin enforcement of voting changes not precleared in accordance with Section 5 of the Voting Rights Act.[11] The Court reached this result notwithstanding Congress' express provision for suit by the Attorney General as a means of enforcing Section 5. The Court reasoned that "achievement of the Act's laudable goal could be severely hampered * * * if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General" (*id.* at 556). Stressing the large number of political subdivisions covered by the Voting Rights Act, the Court observed that the Attorney General's limited staff "often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government" (*ibid.*).

Similar reasoning applies to Title IX, a statute enacted three years after *Allen* found an implied private right of action under the "no person" language in Section 5 of the Voting Rights Act. Title IX was intended to eliminate sex discrimination in federally funded education programs. See, *e.g.*, 117 Cong. Rec. 30403 (1971) (Senator Bayh); 118 Cong.

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[11] In the 1975 extension of the Voting Rights Act, Congress expressly approved the decision in *Allen*. See S. Rep. No. 94-295, 94th Cong., 1st Sess. 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975).

Rec. 5803 (1972) (Senator Bayh).[12] If Congress' broad remedial purpose is to be realized, enforcement should not be relegated entirely to the administrative fund termination procedure provided in Section 902 of the Education Amendments. The resources of the Department of Health, Education, and Welfare are limited and, although the Department has recently renewed its commitment to vigorous Title IX enforcement efforts (see Statement of Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare, Press Release (June 26, 1978)), private litigation remains an indispensable complement to governmental action if the goals of Title IX are to be achieved. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210-211 (1972). Private litigation would not only provide an avenue for the vindication of personal rights under Title IX, but it would also aid HEW and other federal agencies in carrying out their statutory obligation to ensure that federal funds are not expended in educational programs that discriminate on the basis of sex. Indeed, if the Court agrees with our interpretation of Title IX in this case, the mere *possibility* of private suits may well prove a more important boon to Title IX enforcement than actual litigation. Authoritative confirmation of a right to challenge Title IX violations in private suits would greatly encourage voluntary compliance with the statute's ban on

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[12] Senator Bayh was the principal sponsor of Title IX.

sex discrimination in federally financed education programs.[13]

II

THE LANGUAGE AND JUDICIAL INTERPRETATIONS OF OTHER FEDERAL STATUTES PROHIBITING VARIOUS FORMS OF DISCRIMINATION IN FEDERALLY FUNDED PROGRAMS SUPPORT RECOGNITION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX

A. A private right of action has been implied under Title VI of the Civil Rights Act of 1964, and Title IX of the 1972 Education Amendments was patterned after Title VI

Title IX is the second in a series of four statutes designed respectively to prohibit discrimination on the basis of race, sex, handicap, and age in federally funded programs. See Title VI of the Civil Rights Act of 1964, 42 U.S.C. (and Supp. V) 2000d *et seq.*;

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[13] The Seventh Circuit in this case is apparently the only court of appeals to date to rule on the existence *vel non* of a private right of action under Title IX. A number of district courts have considered the issue, and the majority have resolved it in the affirmative. Compare *Jones* v. *American University*, Civ. No. 78-565 (D.D.C. July 27, 1978); *Alexander* v. *Yale University*, Civ. No. N-77-277 (D. Conn. Dec. 21, 1977); *Grossman* v. *Texas Tech University*, Civ. No. CA-5-77-23 (N.D. Tex. Nov. 18, 1977); and *Piascik* v. *Cleveland Museum of Art*, 426 F.Supp. 779, 780-781 & n.1 (N.D. Ohio 1976), with *Lodwig* v. *Board of Education of Pleasant Local School District*, Civ. No. C-76-604 (N.D. Ohio Mar. 31, 1977), appeal pending, No. 77-3375 (6th Cir.); and *Cape* v. *Tennessee Secondary School Athletic Association* 424 F.Supp. 732 (E.D. Tenn. 1976), rev'd on other grounds, 563 F.2d 793 (6th Cir. 1977). Cf. *Trent* v. *Perritt*, 391 F.Supp. 171, 173 (S.D. Miss. 1975) (rejecting Title IX claim on the merits).

Title V of the Rehabilitation Act of 1973, 29 U.S.C. 794; Title III of the Older Americans Amendments of 1975, 42 U.S.C. (Supp. V) 6101 *et seq.* Title IX was avowedly modeled on the first of these statutes, Title VI of the Civil Rights Act of 1964. The 1972 legislation was intended to fill part of the gap left by Title VI's failure to prohibit discrimination on the basis of sex and, in fact, Title IX was originally characterized as an amendment to Title VI. See, *e.g.*, 117 Cong. Rec. 9822 (1971) (Representative Green); *id.* at 30404, 30407-30408 (Senator Bayh); *id.* at 30411 (Senator Cook); 118 Cong. Rec. 5803, 5807 (1972) (Senator Bayh).

1. In *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), the United States argued as amicus curiae that Title VI impliedly authorizes private suits to enforce the statute's prohibition of discrimination on the basis of race, color, or national origin in federally funded programs.[14] See Supplemental Brief for the United States at 26-34. Four Justices adopted this position (see Stevens, J., concurring in the judgment in part and dissenting in part, slip op. 12-14), and four others assumed without deciding that Title VI does

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[14] Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

confer a private right of action (see Powell, J., announcing the judgment of the Court, slip op. 12-14; Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting, slip op. 4 & n.8). As Mr. Justice Stevens observed, this Court and numerous lower federal courts have either "concluded or assumed that a private action may be maintained under Title VI" (Stevens, J., slip op. 12). See, *e.g.*, *Lau* v. *Nichols*, 414 U.S. 563, 566 (1974); *Jefferson* v. *Hackney*, 406 U.S. 535, 549-550 n.19 (1972); *Uzzell* v. *Friday*, 547 F.2d 801 (4th Cir.), aff'd en banc, 558 F.2d 727 (1977); *Gilliam* v. *City of Omaha*, 524 F.2d 1013 (8th Cir. 1975); *Garrett* v. *City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974); *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1138 (2d Cir. 1973); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967).

In *Lau* v. *Nichols*, *supra*, this Court decided a private Title VI claim on its merits. No question was raised about petitioners' right to sue under the statute. The Court expressly based its decision on Title VI and refused to reach petitioners' Equal Protection Clause argument. *Lau* thus implicitly recognized the legitimacy of private suits under Title VI.[15]

[15] Three Justices, concurring in the result in *Lau*, noted that the respondents in that case did not contest the standing of the complainants "to sue as beneficiaries of the federal funding contract" there involved. 414 U.S. at 571 n.2 (Stewart, J., concurring in the result).

2. The court of appeals in the present case rejected petitioners' argument that *Lau* and the other cases cited above support the existence of a private right of action under Title VI and, indirectly, under Title IX as well. The court focused first on Mr. Justice Blackmun's concurring opinion in *Lau*. The relevant portion of that opinion, not joined by any other member of the Court, states (414 U.S. at 571-572):

> I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom.
> * * *
> I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child * * *, I would not regard today's decision * * * as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction.

From these remarks, the court of appeals inferred that *Lau* "does not indicate that Title VI provides a private right of action for each individual discriminatee" (Pet. App. A-12). The court suggested, however, that Title VI and Title IX might support private litigation by large groups of people challenging racial or sexual discrimination in federally funded programs.

There is no basis for the court of appeals' suggestion that the viability of a private suit under Title

VI or Title IX should depend on the number of plaintiffs involved. Mr. Justice Blackmun's concurring opinion in *Lau* simply asserts that the *result* reached by the Court in that case may be explained in part by the number of Chinese children denied supplementary instruction in English. The opinion is subject to two interpretations. It may mean that Mr. Justice Blackmun would have found no Title VI violation if significantly fewer children had been involved. Or it may concern only the appropriate remedy once a Title VI violation has been established, *i.e.*, the opinion may mean that certain kinds of relief, such as mandatory initiation of bilingual instruction in a particular school district, should be awarded only when a sufficient number of persons have been affected by the Title VI violation at issue. Whichever reading is the more accurate, however, the opinion does not contain the slightest hint that a private person's *access to federal court* should turn on his or her ability to identify other persons similarly aggrieved.

On rehearing in the present case, the court of appeals gave a second explanation for its conclusion that *Lau* and the other authorities cited by petitioner provide no support for private suits under Title VI. The court stated that *Lau* and the other cases cited were in fact brought under 42 U.S.C. 1983 and therefore involved no judicial recognition of a private right of action directly under Title VI (Pet. App. A-31 n.6, A-33 to A-34 & n.7). This analysis is inaccurate. While it is true that Section 1983 may be used to

vindicate federal statutory as well as constitutional rights (see, *e.g.*, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972)),[16] at least some of the

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[16] Section 1983 provides a cause of action to redress deprivations, under color of state law, of rights, privileges, and immunities secured by the laws of the United States. Federal jurisdiction over at least some such suits is conferred by 28 U.S.C. 1343(3), which covers civil actions to redress deprivations, under color of state law, of rights secured by "any Act of Congress *providing for equal rights* of citizens or of all persons within the jurisdiction of the United States" (emphasis added). Another possible jurisdictional base for Section 1983 suits is 28 U.S.C. 1343(4), which covers actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress *providing for the protection of civil rights*" (emphasis added).

Neither Section 1343(3) nor Section 1343(4) of the Judicial Code contains a jurisdictional amount requirement. Litigants allegedly deprived, under color of state law, of rights secured by federal statutes frequently assert a cause of action under Section 1983 and attempt to invoke federal jurisdiction under 28 U.S.C. 1343(3) or 1343(4), when they are unable to satisfy the $10,000 jurisdictional amount requirement in the general "federal question" jurisdictional provision, 28 U.S.C. 1331. See, *e.g.*, *Gomez* v. *Florida State Employment Service*, 417 F.2d 569, 578-580 (5th Cir. 1969). Such attempts to assert jurisdiction under Section 1343(3) or Section 1343(4) sometimes encounter difficulty where the federal statutes conferring the underlying substantive rights arguably are not Acts of Congress "proving for equal rights of citizens or of all persons within the jurisdiction of the United States" or "providing for the protection of civil rights * * *." See, *e.g.*, *Chapman* v. *Houston Welfare Rights Organization*, No. 77-719 (argued October 2, 1978); *Gonzalez* v. *Young*, No. 77-5324 (argued October 2, 1978). See also *Hagans* v. *Lavine*, 415 U.S. 528 (1974); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968) (all involving alleged violations of the Equal Protection Clause "substantial" enough

cited cases upholding private suits under Title VI do not even mention Section 1983. For example, the court of appeals' opinion in *Bossier Parish School Board* v. *Lemon*, *supra*, makes clear that plaintiffs' cause of action was sustained on the basis of Title VI alone, without regard to the possibility that Section 1983 might provide an independent basis for Title VI enforcement. See 370 F.2d at 852.[17] Further-

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to permit federal courts to take jurisdiction under Section 1343(3) and then resolve pendent statutory claims to the effect that state welfare practices were inconsistent with federal law). No such problem arises under either Title VI or Title IX. These statutes plainly provide for "equal rights * * * of all persons within the jurisdiction of the United States" and for "the protection of civil rights." Federal jurisdiction is therefore conferred by 28 U.S.C. 1343(3) and 1343(4).

[17] In its opinion on rehearing in the present case, the court of appeals stated, "As we read the case, *Bossier* relies on Title VI's prohibition of racial discrimination in federally funded educational programs merely to give plaintiffs the requisite *standing* to sue 'to enforce a national *constitutional* right'" (Pet. App. A-31 n.6). This is an incorrect interpretation of the Fifth Circuit's opinion. The black children in *Bossier Parish* lived on a federal enclave, a United States Air Force base. An initial question arose whether the children were members of the local school system with standing to challenge discrimination in that system. This issue was quite independent of the question whether Title VI creates a private cause of action. The Fifth Circuit held that the children were members of the school system because the school board had agreed to admit them in connection with its acceptance of federal funds. (The court further held that, even if the school board were under no legal obligation to admit the children, once they were in fact admitted, they had standing to assert their right to a desegregated education.) Only after the court resolved this standing question did it turn to the question

more, in a number of cases, courts have granted relief under Title VI where an action under Section 1983 would not lie. For example, a Section 1983 suit could not have been maintained against defendant in *Hawthorne* v. *Kenbridge Recreation Association, Inc.*, 341 F.Supp. 1382 (E.D. Va. 1972), because the recreation association was a private nonprofit corporation not operating under color of state law. Nonetheless, the district court entered an order under Title VI directing the association to accept and evaluate membership applications without regard to race, color, or national origin.[18]

Most important, the court of appeals' reliance on Section 1983 as an explanation for previous private suits under Title VI is faulty because it contemplates a distinction inconsistent with Congress' purpose in enacting the latter statute. In the court of appeals' view, Title VI may be enforced through private suits whenever an allegedly discriminating recipient of

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whether Title VI creates a private right of action (see 370 F.2d at 852). The passage from the *Bossier Parish* opinion cited by the court of appeals in this case has nothing to do with the latter question. As this Court recognized in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453, 456 (1974), the question whether one or another private party has standing to sue under a particular statute is logically distinct from the question whether that statute can support any private suits at all.

[18] The court held that the association was covered by Title VI because it had received a recreational development loan from the Farmers' Home Administration, an agency of the federal government.

federal funds acts under color of state law. In such a situation, Section 1983 provides the necessary cause of action. Where the discriminating recipient of federal funds is a private institution, however, the court of appeals would preclude enforcement through private litigation. This distinction between public and private recipients of federal financial assistance ignores the fact that, in enacting Title VI, Congress sought to prohibit discrimination on the basis of race in *all* federally funded programs. Nothing in the legislative history of Title VI suggests that Congress envisioned different enforcement schemes depending on the public or private character of aid recipients. The court of appeals' effort to characterize all previous Title VI suits as actions brought under Section 1983 is unpersuasive. Title VI itself creates a private right of action, and that right has been recognized by numerous federal courts.

3. In his separate opinion in *Bakke*, *supra*, Mr. Justice White took the position that a private right of action is not implied under Title VI. Emphasizing that Title VI was intended to reach federally funded programs conducted by private institutions, even where government involvement in those programs is insufficient to justify their characterization as "state action," Mr. Justice White found it "difficult to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law" (slip op. 5-6) (emphasis in original). But precisely the same statement could be made about a number of cases where

the Court *has* found a private right of action to be implied under federal legislation. See, *e.g.*, *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U.S. 33 (1916); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); and *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), in all of which the conduct or events giving rise to the private suit would not have involved any violation of federal law before passage of the statutes that this Court decided could be enforced through private litigation.

Mr. Justice White further stated that implication of a private remedy under Title VI would be inconsistent with the legislative scheme of the Civil Rights Act of 1964. In support of this proposition, he cited the remedy provisions contained in other portions of the Act. Title II and Title VII, the public accommodations and employment titles, both reach private discriminatory conduct not previously proscribed by federal law. Both titles explicitly provide for enforcement through private suits. See 42 U.S.C. 2000a-3 and 42 U.S.C. (Supp. V) 2000e-5(f). In Mr. Justice White's view, the absence of such a provision in Title VI reflects a congressional decision not to permit private suits as a means of enforcing the guarantee against discrimination in federally funded programs. But the private rights of action provided in Title II and Title VII are limited both procedurally and remedially.[19] A conclusion at least

[19] For example, both Title II and Title VII express a preference for state or local resolution of complaints concerning discrimination in public accommodations or employment where

as plausible as Mr. Justice White's is that Congress wished to impose no such limits on private suits under Title VI.

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the alleged act or practice in violation of the federal statute is also prohibited by state or local law. Title II provides that in such a situation no federal civil action may be brought until 30 days after written notice of the alleged act or practice has been given to the appropriate state or local authority. Title II further provides that in any civil action brought after the 30-day period has expired, the district court may stay proceedings "pending the termination of State or local enforcement proceedings." 42 U.S.C. 2000a-3(c). Title VII is even more deferential to state and local enforcement mechanisms. Where such mechanisms are available, Section 706(b) of the Civil Rights Act, 42 U.S.C. (Supp. V) 2000e-5(c), prevents the filing of any charge with the Equal Employment Opportunity Commission until at least 60 days after proceedings have been commenced under state or local law (unless such proceedings have been earlier terminated). A charge filed with the Commission is a prerequisite to a federal civil action, and no private action may be commenced until the Commission has dismissed the charge or has had at least 180 days to secure voluntary compliance or initiate a government suit. 42 U.S.C. (Supp. V) 2000e-5(f). (As originally passed, Title VII permitted private suits to be filed somewhat sooner—60 rather than 180 days after the filing of a charge still pending with the Commission. See 42 U.S.C. 2000e-5(e).)

In addition to favoring state, local and EEOC resolution of grievances, Congress limited the remedies available in private actions under Title II and Title VII. Title II authorizes only "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order * * *." See 42 U.S.C. 2000a-3(a). As initially enacted, Title VII allowed federal courts to enjoin unlawful employment practices and to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay * * *." 42 U.S.C. 2000e-5(g). The statute was amended in 1972 to authorize the award of "any other equitable relief as the court deems appropriate." See 42 U.S.C. (Supp. V) 2000e-5(g).

This explanation derives support from the fact that Congress relied on different constitutional grants of legislative power in passing Title II and Title VII, on the one hand, and Title VI, on the other. Title II and Title VII represent broad exercises of the congressional power to regulate interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). They reach enterprises and activities not connected directly or indirectly with the federal government. Before 1964 racial or ethnic discrimination by private employers or private operators of public accommodations was restricted by state law, if it was restricted at all. Under these circumstances, it is hardly surprising that Congress chose to defer to state and local enforcement procedures, where such procedures are available. Nor is it surprising that Congress decided to limit the remedies for Title II and Title VII violations to those most clearly related to eliminating the burden of discrimination on interstate commerce. By contrast, the legislative authority invoked by Title VI is the power to spend federal funds.[20] Congress can legitimately impose specific conditions on those who voluntarily receive federal financial assistance. See generally

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[20] See 110 Cong. Rec. 2468 (1964) (Representative Celler) ("As a matter of simple justice, Federal funds, to which taxpayers regardless of race, color, or creed [*sic*] contribute, ought not be expended to support or foster discriminatory practices"); 110 Cong. Rec. 6544 (Senator Humphrey) ("The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination").

Steward Machine Co. v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937). Where those conditions are violated by a recipient of public monies, there is no reason for Congress to defer to state or local law. The task of ensuring that federal funds are expended in accordance with the standards imposed by federal statute is uniquely federal. Similarly, there is no need to tailor potential relief to address interstate commerce concerns, because the statute in question is not grounded on the commerce power. In short, the fact that Title VI does not contain private action provisions like those found in Title II and Title VII does not mean that Congress wished to preclude private suits under Title VI; rather, Congress simply chose not to encumber Title VI actions with the same procedural and remedial restrictions applicable to suits under Title II and Title VII.[21]

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[21] Mr. Justice White also observed in his separate opinion in *Bakke, supra*, slip op. 2-3, that Titles III and Title IV of the Civil Rights Act of 1964, designed to eliminate discrimination in public facilities and public education, explicitly stated that they "would not adversely affect pre-existing private remedies." See 42 U.S.C. 2000b-2 and 2000c-8. These provisions referred to the private right of action conferred by 42 U.S.C. 1983 to redress deprivations of constitutional rights under color of state law. Of course, such a provision would have been inappropriate for inclusion in Title VI because, as Mr. Justice White also noted (slip op. 5-6), Title VI prevents discrimination on the basis of race, color, or national origin in *all* federally funded programs, not just those involving "state action."

4. Even if this Court ultimately should decide that Title VI of the Civil Rights Act did not create a private right of action, that would not be fatal to petitioner's position here. Whatever Congress may have thought when it enacted Title VI in 1964, by the time it passed the Education Amendments of 1972, several courts had already held that private suits could proceed under Title VI. See *Bossier Parish School Board* v. *Lemon, supra; Gautreaux* v. *Chicago Housing Authority*, 265 F.Supp. 582 (N.D. Ill. 1967);[22] *Hawthorne* v. *Kenbridge Recreation Association, Inc., supra; Blackshear Residents Organization* v. *Housing Authority of City of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1972).[23] Thus, Title IX was enacted against a background of judicial approval of private litigation under the earlier statute.[24]

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[22] In *Green Street Association* v. *Daley*, 373 F.2d 1, 8-9 (7th Cir.), cert. denied, 387 U.S. 932 (1967), the Seventh Circuit had an opportunity to repudiate the construction of Title VI in *Bossier Parish* and *Gautreaux*, but did not do so.

[23] See also *Nashville I-40 Steering Committee* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied, 390 U.S. 921 (1968); *Alvarado* v. *El Paso Independent School District*, 445 F.2d 1011 (5th Cir. 1971); *Thomas* v. *Housing Authority of City of Little Rock*, 282 F.Supp. 575 (E.D. Ark. 1967); *McGhee* v. *Nashville Special School District*, 11 Race Rel. L. Rep. 698 (W.D. Ark. 1966), all relying on both the Constitution and Title VI.

[24] That Congress endorsed and sought to encourage such litigation is demonstrated by a provision contained elsewhere in the Education Amendments of 1972. Section 718 of the same statute that includes Title IX, now codified at 20 U.S.C. 1617, expressly provides attorney's fees for prevailing parties other than the United States in suits against local educational agen-

The fact that Congress, under these circumstances, modeled the language of Title IX after that used eight years earlier in Title VI is persuasive evidence that it expected private suits to be permitted under Title IX. This Court has recognized that intervening judicial and administrative interpretation of predecessor statutes may be highly relevant in construing future legislation patterned after the earlier laws. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-420 (1975); *Carolene Products Co.* v. *United States*, 323 U.S. 18, 25-26 (1944). That principle applies here, where it is unquestioned that Title IX was modeled on the legislative scheme employed in Title VI and where Congress in 1972 made no effort

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cies, states, or the United States for discrimination on the basis of race, color, or national origin, in violation of Title VI of the Civil Rights Act of 1964 as it pertains to elementary and secondary education. See S. Conf. Rep. No. 92-798, 92d Cong., 2d Sess. 218 (1972). This provision evidently was intended to permit successful private plaintiffs in suits like *Bossier Parish* to recover reasonable attorney's fees.

Of course, the coverage of Section 718 has recently been expanded by the 1976 Civil Rights Attorney's Fees Awards Act, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988) (see pages 33-35, *infra*), which applies to all suits under Title VI, against private as well as public defendants, and to all suits under other federal civil rights statutes, including Title IX. The critical point here is not that Congress in 1972 decided to allow recovery of attorney's fees only in a limited number of suits under Title VI, but that Congress' decision to allow such recovery even in some suits reflected a recognition that private suits could be maintained under Title VI. This recognition was contemporaneous with the passage of Title IX which was intentionally patterned on Title VI.

to reject the precedents allowing private suits under the earlier statute.

This view of the congressional understanding in 1972 is supported not only by the language and history of additional antidiscrimination provisions enacted after Title IX (see pages 35-43, *infra*) but also by the 1976 Civil Rights Attorney's Fees Awards Act, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988). The Act authorizes courts to grant attorney's fees to the prevailing party in actions brought to enforce certain civil rights statutes, including both Title VI and Title IX.[25] Statements by several legislators during debate on the Act evidenced a widespread assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination. See, *e.g.*, 122 Cong. Rec. S16251 (daily ed. September 21, 1976) (Senator Scott); *id.* at S16252 (Senator Kennedy); *id.* at S16262 (Senator Allen); 122 Cong. Rec. S16431 (daily ed. September 22, 1976) (Senator Hathaway); 122 Cong. Rec. S17051 (daily ed. September 29, 1976) (Senator Tunney); *id.* at S17052 (Senator Abourezk); 122 Cong. Rec. H12159 (daily ed. October 1, 1976) (Representative Drinan); *id.* at H12162-H12163 (Representative Kastenmeier); *id.* at H12164 (Representative Holtzman); *id.* at H12165 (Representative

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[25] The Act states, in pertinent part:

> In any action or proceeding to enforce * * * title IX of Public Law 92-318, * * * or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Seiberling). Senator Abourezk, the floor manager of the bill, specifically stated that *all* of the civil rights laws covered by the proposed Act "depend heavily upon private parties for enforcement" and that, by authorizing the award of attorney's fees to prevailing parties, the Act would "enlist[] private citizens as law enforcement officials." 122 Cong. Rec. S17052 (daily ed. September 29, 1976).

On rehearing in the present case, the court of appeals dismissed all these statements on the ground that they were not "explicitly declarative" of Congress' intent in passing Title IX, but rather involved "a mere assumption concerning a judicial construction that had been or might be placed on a statute after its enactment" (Pet. App. A-25). The court stressed instead (Pet. App. A-25 to A-27) a colloquy on the House floor during which Representative Railsback and Representative Drinan, supporters of the bill, assured two of their colleagues that the Attorney's Fees Awards Act would not create a new cause of action. The colloquy occurred after the bill had already passed the Senate. Representative Quie and Representative Bauman, apparently inspired by the court of appeals' initial decision in this case, expressed concern that the new Act might be read to authorize private suits under Title IX. See 122 Cong. Rec. H12152-H12153 (daily ed. October 1, 1976). Representative Railsback replied that the Act was intended not to create a new remedy but only to allow the recovery of attorney's fees "in the event that the

courts should in the future determine that an individual may sue" under Title IX. This exchange did not in any way detract from the validity of the views expressed by other legislators to the effect that private actions can be maintained under Title IX. Although the Attorney's Fees Awards Act did not authorize such actions, its legislative history reveals that many members of Congress believed that private suits had already been authorized by Title IX itself.

B. Title V of the Rehabilitation Act of 1973, a statute modeled on Title VI and Title IX, may be enforced through private litigation

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, provides:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The statute thus prohibits discrimination against the handicapped in the same way that Title VI prohibits discrimination on the basis of race and Title IX prohibits discrimination on the basis of sex. Like Title VI and Title IX, Title V of the Rehabilitation Act says nothing explicit about its enforceability through private suits. Also like Title VI and Title IX, Title V contemplates enforcement through an administrative fund termination procedure. See Executive Order No. 11914, 41 Fed. Reg. 17871 (1976). Nonetheless, there is persuasive evidence that Congress intended to

create a private right of action under Title V, and that evidence corroborates the conclusion that Congress envisioned a similar method of enforcement for Title VI and Title IX.

One year after the Rehabilitation Act became law, Congress passed a number of technical and clarifying amendments (88 Stat. 1617) designed, *inter alia*, to eliminate any doubt that the antidiscrimination provision of Section 504 was intended to protect all handicapped persons, not only those in need of, or able to benefit from, vocational rehabilitation services. The language of Section 504 itself was not affected. In the committee reports accompanying the 1974 amendments, Congress plainly revealed its perception of Section 504 as a counterpart to Section 601 of the Civil Rights Act and Section 901 of the Education Amendments. Congress also indicated its belief that all three provisions could support private actions. The Senate Committee on Labor and Public Welfare stated:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 [*sic*; 20 U.S.C. 1681] (relating to sex). * * *
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of

> recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. * * * This approach to implementation of section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, *and permit a judicial remedy through a private action.*

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (emphasis added). See also S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974).[26]

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[26] Of course, Congress' statement in 1974 that a statute enacted two years earlier created a private right of action is not necessarily dispositive of the issue presented here. But the committee comments reproduced in the text are substantially more authoritative than most post-hoc indications of legislative intent. Not only did those comments appear shortly after passage of the Education Amendments of 1972, but they were issued by the very Senate committee that had considered the 1972 Amendments, including Title IX. The 1974 committee report accompanying the Rehabilitation Act amendments is thus a particularly persuasive piece of legislative history. This Court has recognized that subsequent legislative statements may be helpful in the interpretation of earlier statutes. See *Glidden* v. *Zdanok*, 370 U.S. 530, 541-542 (1962) (plurality opinion); *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958) ("Subsequent legislation which declares the intent of an earlier law is not, of course, conclusive in deter-

Last Term, this Court reviewed a decision in which a three-judge federal district court resolved a private suit on constitutional grounds and did not rule on appellees' claim under Section 504. The Court vacated the judgment below and remanded "with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973 * * *." *Campbell* v. *Kruse*, 434 U.S. 808 (1977). This disposition implicitly recognized that a private action can be maintained under Title V. Several lower federal courts, including the Seventh Circuit, have explicitly reached the same conclusion. See *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *Vanko* v. *Finley*, 440 F. Supp. 656 (N.D. Ohio 1977). The court of appeals decided *Lloyd* while the present case was pending on rehearing. The Seventh Circuit panel in this case then distinguished *Lloyd* on the ground that the Rehabilitation Act decision turned on the lack of an effective administrative remedy to vindicate the rights guaranteed by Section 504 (Pet. App. A-32). By contrast, in the panel's view, the procedure established by Section 902 of the Education Amendments and HEW's implementing regulations does constitute an adequate administrative enforcement scheme for the rights guaranteed by Title IX and therefore no private right of action need be implied under the 1972 law.

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mining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction").

While the Seventh Circuit's decision in *Lloyd* may have rested in part on HEW's delay in issuing effective regulations under the Rehabilitation Act (see 548 F.2d at 1285-1287), the panel's emphasis on this aspect of the decision creates an artificial distinction between Title IX and Title V. From the outset Congress expected that Section 504 enforcement would involve administrative action similar or identical to that provided under Title IX. Indeed, when HEW had not issued implementing regulations within a year after passage of the Rehabilitation Act, Congress expressly directed that such regulations be issued promptly and that they follow the models applicable under Title VI and Title IX. See S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-41 (1974). The reference in the very same committee report to "a judicial remedy through a private action" was not dependent on an assumption that the regulations would be further delayed and did not in any way suggest that private actions should be permitted only until the regulations became effective. The long-awaited regulations have now been promulgated (see 45 C.F.R. Part 84; and 43 Fed. Reg. 2136 (1978) (to be codified at 45 C.F.R. Part 85)), and, like the regulations issued under Title IX, they incorporate the enforcement procedures first adopted under Title VI of the Civil Rights Act. See 45 C.F.R. 84.61 and 86.71 (both incorporating 45 C.F.R. 80.6-80.10 and Part 81). Issuance of most of the Title V regulations preceded this Court's decision in *Campbell* v. *Kruse*,

supra, and the Second Circuit's decision in *Leary* v. *Crapsey*, *supra*. Yet neither court saw fit to depart from the result reached in *Lloyd* simply because the anticipated administrative enforcement scheme had taken effect.

C. The express provision for an exclusive administrative remedy in Title III of the Older Americans Amendments of 1975 indicates that Congress did not wish to preclude private suits under Title IX, a statute that contains no such provision

Title III of the Older Americans Amendments of 1975, 42 U.S.C. (Supp. V) 6101 *et seq.*, represents a compromise between the House and Senate. The House passed a bill prohibiting age discrimination in federally funded programs. The bill bore a strong resemblance to Titles VI and IX, except that it specifically excluded cases where age is a factor necessary to the normal operation of a particular federally assisted program or activity. H.R. 3922, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 94-67, 94th Cong., 1st Sess. 15-16, 32 (1975); H.R. Conf. Rep. No. 94-670, 94th Cong., 1st Sess. 52-53, 56 (1975). The Senate, on the other hand, thought further study necessary before adoption of a legislative prohibition on age discrimination in federal programs. Accordingly, the Senate bill provided only for a thorough study of the subject by the Commission on Civil Rights. S. 1425, 94th Cong., 1st Sess. (1975); S. Rep. No. 94-255, 94th Cong., 1st Sess. 31-32, 49 (1975); H.R. Conf. Rep. No. 94-670, *supra*, at 54. The conference committee compromise retained the House's

general prohibition against age discrimination,[27] but provided that the prohibition should operate only pursuant to regulations issued by the Secretary of HEW and the heads of other federal departments and agencies. The regulations in turn are to be issued only after completion of a study by the Commission on Civil Rights along the lines originally proposed by the Senate. See 42 U.S.C. (Supp. V) 6102, 6103, 6106; H.R. Conf. Rep. No. 94-670, *supra*, at 57. No regulations are to become effective before January 1, 1979.

As part of the compromise, Section 305(e) of the Older Americans Amendments, 42 U.S.C. (Supp. V) 6104(e), provided that administrative measures for achieving compliance with the regulations thus issued shall be "the exclusive remedy for the enforcement" of Title III.[28] Congress thus demonstrated that it was

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[27] Section 303 of the Older Americans Amendments, 42 U.S.C. (Supp. V) 6102, provides in pertinent part:

> * * * [N]o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

[28] Section 305(a), 42 U.S.C. (Supp. V) 6104(a), provides:

> The head of any Federal department or agency who prescribes regulations under section 6103 of this title may seek to achieve compliance with any such regulation—
>
> (1) by terminating, or refusing to grant or to continue, assistance under the program or activity involved to any recipient with respect to whom there has been an express finding on the record,

capable of making its wishes explicit when it wanted to prohibit a certain kind of discrimination in federally funded programs but at the same time to restrict the procedures available for enforcing that prohibition. The conference committee report is instructive. The committee stated:

> Neither the private right to seek a remedy through civil suit contemplated by the House bill nor the authority of the Attorney General to bring "pattern and practice" actions contained therein is included in the conference substitute; thus, implementation will proceed through a set of consistent Federal regulations rather than on a case by case method in the courts.

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after reasonable notice and opportunity for hearing, of a failure to comply with any such regulation; or

(2) by any other means authorized by law.

Section 305(a)(2)'s reference to "any other means authorized be law" apparently contemplated injunctive suits brought by the Attorney General at the instance of federal grant agencies that have detected violations of their regulations. Such proceedings against offending recipients of federal funds could serve as an alternative to fund termination, even though Congress did not authorize the Attorney General to sue on his own initiative. Cf. 45 C.F.R. 80.8(a)(1) (interpreting the phrase "other means authorized by law" as used in Title VI to comprehend enforcement through referrals to the Department of Justice "with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States"). 45 C.F.R. 80.8 has been incorporated by reference in the regulations issued by HEW under Title IX and under Title V of the Rehabilitation Act (see page 39, *supra*).

H.R. Conf. Rep. No. 94-670, *supra*, at 57. But the House bill said nothing about private suits. If the bill "contemplated" a private right of action, it did so only through its use of language identical to that used in Title VI of the Civil Rights Act, Title IX of the Education Amendments, and Title V of the Rehabilitation Act. See H.R. 3922, *supra;* H.R. Rep. No. 94-67, *supra*, at 32. The conference committee report thus reflects the congressional understanding that statutes using the "no person" formula (*i.e.*, "no person * * * shall, on the basis of ————, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under * * *") ordinarily do create a private right of action.

III

APPLICATION OF THE FOUR-PART TEST ANNOUNCED BY THIS COURT IN *CORT* v. *ASH* SUPPORTS IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX

This Court has frequently found it necessary to decide whether particular statutes, though silent on the subject of private remedies, should nevertheless be construed to authorize enforcement through private suits. See, *e.g.*, *Allen* v. *State Board of Elections*, *supra; J. I. Case Co.* v. *Borak*, *supra; Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192 (1944); *Texas & Pacific Railway Co.* v. *Rigsby*, *supra.* By hypothesis in such situations, the legislature has not addressed the question whether a private right of action should be recognized. Where the legislature

has spoken, of course, its command governs, and no issue of implication arises. But where Congress has not made its wishes clear, the courts have been faced with the difficult task of deciding whether enforcement through private litigation is consistent with the "dominating general purpose" of the statute involved. See *SEC* v. *C.M. Joiner Corp.*, 320 U.S. 344, 350-351 (1943).

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court reviewed its earlier decisions concerning implication of a private right of action and enumerated several factors that are pertinent "[i]n determining whether a private remedy is implicit in a statute not expressly providing one * * *." The unanimous Court asked the following four questions (*ibid.*):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," * * * —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Assertedly applying the test announced in *Cort*, and relying as well on two other recent decisions by this Court, *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975), and *National Railroad*

Passenger Corp. v. *National Association of Railroad Passengers (Amtrak)*, 414 U.S. 453 (1974), the court of appeals here concluded that no private right of action is implied under Title IX. Its decision has been criticized on the ground that it fails to take adequate account of this Court's "consistently favorable attitude toward permitting [private] suits under [civil rights] statutes." See Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L. J. 1378, 1388 (1978). See also Karst, *Federal Remedies*, 54 U. Det. J. Urb. L. 1025, 1030 (1977); Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 Calif. L. Rev. 1121, 1149-1159 (1974). While this criticism appears justified (neither court of appeals' opinion so much as mentions *Allen*, for example), one need not fully accept its assessment of past implication decisions in order to conclude that the court of appeals erred in this case. Even if earlier cases do not suggest that this Court has been more willing to find implied private rights of action in the civil rights context than elsewhere, straightforward application of the criteria announced in *Cort*[29] sufficiently demonstrates that the judgment below should be reversed.

Petitioner is plainly a member of the class of persons for whose especial benefit Title IX was enacted.

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[29] Respondent stockholder in *Cort* sought to base an implied private right of action on a criminal statute prohibiting certain corporate political contributions. No civil rights issues were involved.

As Senator Bayh explained, the statute was designed "to provide women with solid legal protection as they seek education and training for later careers * * *." 118 Cong. Rec. 5806-5807 (1972). In proposing the amendment that became Title IX, Senator Bayh presented detailed documentation of the "massive, persistent patterns of discrimination against women in the academic world" (*id.* at 5804). See also *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcommittee on Education of the House Committee on Education and Labor*, 91st Cong., 2d Sess. (1970). When Congress prohibited discrimination on the basis of sex in federally funded education programs, it was addressing itself to precisely the kind of discrimination petitioner allegedly suffered in this case.

Moreover, as this Court's decision in *Allen* demonstrates, Congress' choice of language reveals an intention to protect all persons from discrimination on the basis of sex. Congress could have provided that "no educational program discriminating on the basis of sex shall receive federal financial assistance." But Congress did not use such language. Rather, it provided that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." This language in Section 901 of the Education Amendments, like the nearly identical language in Section

601 of the Civil Rights Act, creates personal rights.[30] See Supplemental Brief for the United States as Amicus Curiae in *Bakke* at 28-29. Congress was not concerned simply with the proper allocation of federal funds; it was seeking to end discrimination on the basis of sex. Similarly, when Congress used the "no person" formula in the Voting Rights Act of 1965, it was seeking to end discrimination on the basis of race or color. *Allen* held that any person denied the right to vote in violation of Section 5 of the Voting Rights Act may sue to enforce the guarantee provided by that statute; likewise, any person excluded

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[30] Title VI of the Civil Rights Act of 1964 was Congress' response to the problem of discrimination against blacks in programs receiving federal aid. This point was not questioned by any of the opinions in *Bakke*. See Powell, J., slip op. 15-17; Brennan, White, Marshall, and Blackmun, JJ., slip op. 5-12; Stevens, J., slip op. 6. Yet despite the conceded legislative focus on discrimination against blacks, no Justice suggested that respondent in *Bakke*, a white man, might not be a member of the class for whose special benefit Title VI was enacted. Not even Mr. Justice White, who believed for other reasons that a private right of action is not implied under Title VI, suggested that respondent was not a member of the group that the statute sought to protect. The simple explanation for this is supplied by the language of Section 601. In providing that "no person" may be excluded from participation in federally funded programs on the basis of race, color, or national origin, Title VI creates a personal right for all persons, black and white, not to be subject to such discrimination. Cf. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 prohibit discrimination against whites as well as blacks). Similarly, Title IX creates a personal right for all persons, men as well as women, not to be subject to discrimination on the basis of sex in federally funded education programs.

from participation in a federally funded education program on the basis of sex should be permitted to sue to enforce Congress' express prohibition of such practices.

Turning to the second relevant factor listed in *Cort*, the contemporaneous legislative history of Title IX does not contain any definitive indication of Congress' intent to create or deny a private remedy.[31] Indeed, if clear evidence of this kind were available, it would be dispositive, and courts would not need to decide whether a private right of action is implied. See *Cort* v. *Ash*, *supra*, 422 U.S. at 82. For this reason, one commentator has observed that "the process of deciding whether to imply a cause of action is more likely to be hindered than helped when placed in the narrow context of a search for tokens of legislative intent." Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 291 (1963).[32] For this reason also, the court of appeals' reliance on this Court's decision in *Amtrak*, *supra*, is misplaced. The legislative history of the Amtrak Act revealed that the relevant congressional committee was aware that the Act permitted private suits

[31] Evidence of legislative intent drawn from the language, legislative history, and judicial interpretations of other statutes enacted before and after Title IX is discussed in point II of this brief (pages 18-43, *supra*).

[32] See also Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-540 (1947) (criticizing the notion of "legislative intent" to the extent it connotes a phenomenon distinct from the statute itself and the congressional purpose underlying its enactment).

only in certain limited circumstances and deliberately rejected a proposal that would have expanded the availability of a private right of action. 414 U.S. at 458-461. This background strongly supported the Court's conclusion that only those private suits explicitly authorized by the statute should be allowed to proceed. See also *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 471-472, 477 & n.18 (1959). No such convincing evidence of legislative intent, narrowly construed, is present in this case.

Cort v. *Ash*, *supra*, 422 U.S. at 82, stated that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." Unlike the criminal statute at issue in *Cort*, Title IX was intended to confer personal rights, in particular, the right to be free from discrimination on the basis of sex in federally funded education programs (see pages 45-47, *supra*). Accordingly, under *Cort*, petitioner need not demonstrate any specific congressional intention to create a private cause of action. Given the lack of any direct evidence that Congress intended to deny such a cause of action, the question becomes whether enforcement through private suits is "consistent with the underlying purposes" of Title IX. That question should be answered in the affirmative.

Administrative enforcement of Title IX is an enormous task. We are informed by HEW that Title IX applies to federally funded education programs at

approximately 97,000 institutions. The number of participants in these programs, and hence the number of beneficiaries of federal funding, is approximately 55 million. The administrative enforcement scheme established in Section 902 of the Education Amendments of 1972, 20 U.S.C. 1682, requires federal agencies extending financial assistance to education programs to attempt to secure voluntary compliance with Title IX and the regulations issued thereunder before taking more drastic enforcement action, such as termination of funding or referral to the Attorney General for a possible injunctive suit. Section 902 further provides that termination or refusal of financial assistance may occur only after the recipient or prospective recipient of funds has been afforded an opportunity for a hearing on the alleged noncompliance with Title IX, and only after the funding agency has submitted to the relevant congressional committees a full report concerning the circumstances and grounds for the proposed termination or refusal of aid and 30 days have elapsed after submission of the report. Effective operation of this administrative process demands a heavy commitment of federal resources, and, even with such a commitment, individual instances of illegal discrimination on the basis of sex are likely to remain without redress.

Moreover, even if funding agencies realistically could expect to detect all Title IX violations and to initiate enforcement activities in response to each one, the administrative remedies provided in Section 902

are not designed to ameliorate the harmful effects suffered by the victims of discrimination. Termination of funding to institutions found to have discriminated in violation of Title IX will hardly help those who have been denied admission to professional schools on the basis of sex, as petitioner alleges she has. A private right of action is necessary to provide adequate relief to the very persons who have suffered the discrimination that Congress sought to prohibit. If the only remedy available for a violation of Title IX were the termination of future federal financial support, Congress' command that no person shall be discriminated against on the basis of sex in federally funded education programs would be an "empty promise" for those who have actually been subjected to such discrimination. Cf. *Allen* v. *State Board of Elections, supra*, 393 U.S. at 557.

Securities Investor Protection Corp. v. *Barbour*, 421 U.S. 412 (1975), does not support the court of appeals' refusal to uphold a private right of action under Title IX. That case held that customers of a financially strapped broker-dealer may not sue to compel the SIPC to intervene on behalf of investors by filing an application to liquidate the broker-dealer's business, thus activating the protections provided by the Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa *et seq.* The Court ruled that private suits of this nature would be "inimical to the purposes of the Act" (421 U.S. at 423). The Court first observed that the SIPC tries to defer intervention as

long as possible in the hope that the broker-dealer will be able either to avoid financial collapse altogether or to liquidate under the supervision of an industry self-regulatory organization or a district court, without danger of loss to customers (*id.* at 421-422). The Court then explained that, in contrast to the Securities and Exchange Commission and the SIPC, a private customer "cannot be expected to consider, or have adequate information to consider, these public interests in timing his decision to apply to the courts" (*id.* at 422). Because the mere filing of a private action based on allegations of financial insecurity might well prove fatal to a broker-dealer's business, the Court concluded that judicial recognition of such suits would be inconsistent with the congressional scheme underlying the creation of the SIPC, a non-profit corporation intended not only to protect customers of failing broker-dealers, but also to "restore investor confidence in the capital markets" by taking steps to improve broker-dealers' financial responsibility (*id.* at 415).

No similar rationale counsels against implication of a private right of action in this case. Enforcement of Title IX through private litigation poses no threat to the stability of federally funded education programs or to the efficacy of administrative enforcement measures. Mr. Justice White, in his separate opinion in *Bakke, supra*, took the position that the administrative enforcement procedures established by Title VI of the Civil Rights Act (see 42 U.S.C. 2000d-1) preclude implication of a private right of

action under that statute, because, if private suits were permitted, persons alleging injury from illegal discrimination would be able to circumvent the procedural requirements that must be satisfied before federal funding may be terminated under Title VI (slip op. 3-5). The administrative enforcement provision in Title IX is nearly identical to the corresponding provision in Title VI (compare 20 U.S.C. 1682 with 42 U.S.C. 2000d-1). Private suits under Title IX are thus subject to the same objection raised by Mr. Justice White to private suits under Title VI. That objection, however, is not persuasive for several reasons.

First, the relief requested in private suits against recipients of federal funds under either Title VI or Title IX will rarely, if ever, include fund termination.[33] The simple explanation for this is that a

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[33] A private plaintiff may, of course, sue a funding agency in an effort to compel the agency to commence administrative enforcement proceedings against an allegedly discriminating recipient of federal aid. In such cases the agency's failure or refusal to act on its own may be reviewed under the standards provided in the Administrative Procedure Act. Cf. *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). A successful plaintiff in this kind of suit may set in motion the administrative process that ultimately can result in the termination of an offending recipient's funds. Even so, however, the plaintiff's personal goal almost always will be individual relief obtained as a byproduct of the agency's mandatory efforts to secure voluntary compliance. If those efforts prove futile, it will little benefit the private plaintiff that the agency eventually decides to impose the sanction of fund termination.

In the present case petitioner joined the federal respondents in her amended complaints and sought "an injunction pro-

private plaintiff is unlikely to derive any benefit from fund termination. Petitioner in this case and respondent in *Bakke* filed suit because they wished to be admitted to medical school, not because they wished to block future federal financial support to the institutions that denied them admission. See *Bakke*, *supra*, slip op. 12 n.26 (opinion of Stevens, J.). Mr. Justice White has suggested that this is a distinction without a difference because, if private suits to enjoin conduct allegedly violative of Title VI or Title IX were permitted,

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hibiting the Secretary and the Regional Director from continuing to fail to investigate promptly and take appropriate related administrative and enforcement actions, including conciliation and efforts to effect voluntarily compliance * * *." The district court sua sponte dismissed this aspect of petitioner's complaints and the court of appeals likewise refused to entertain petitioner's claim under the APA (Pet. App. A-20). In her brief in this Court (Br. 20), petitioner asserts that "denial of the administrative relief sought against HEW was incorrect." The correctness *vel non* of the court of appeals' ruling on petitioner's APA claim is an issue not fairly comprised within the question presented for review in this Court. Under this Court's Rule 40(1)(d)(2), briefs on the merits may not raise questions additional to those presented in the petition for a writ of certiorari. Accordingly, this Court should not now review petitioner's challenge to the dismissal of her complaints against the federal respondents. If petitioner does not prevail in her contention that Title IX creates a private right of action, the federal respondents will, of course, fulfill their responsibility under applicable regulations to conduct an administrative investigation of petitioner's charges against the University of Chicago and Northwestern University.

> recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of [the relevant statute] or refusing federal funds and thereby escaping from the statute's jurisdictional predicate. This is precisely the same choice which would confront recipients if suit was brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

Bakke, *supra*, slip op. 8 (opinion of White, J.) (footnote omitted). This analysis ignores the personal relief that may be awarded in a private suit under Title VI or Title IX, without regard for whether the recipient of federal funds chooses to accept or reject such funds in the future. In this case, for example, if petitioner proves the sex discrimination she has alleged, the district court may order her admission to medical school, even if the University of Chicago and Northwestern University never accept another penny of federal aid.[34]

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[34] Consider also the recipient that obtains a federal grant to finance the building of a particular educational facility, but decides not to seek additional federal funds in ensuing years. Such a recipient is bound not to discriminate on the basis of race or sex as long as the federally financed facility is in use for the purpose for which it was funded. See 45 C.F.R. 86.4(b)(1); 45 C.F.R. 80.4(a)(1). If at some point during the facility's lifetime, the recipient nevertheless discriminates in violation of Title VI or Title IX, funding termination could not serve as a meaningful sanction because by hypothesis the recipient would no longer be receiving funds that could be terminated. In this situation, an injunctive

An additional problem with the view that private litigation is incompatible with the administrative remedy provided in Title VI and Title IX is that it disregards earlier decisions in which this Court and others have recognized a private cause of action to enforce certain statutory rights, even though the statute at issue explicitly contemplates administrative enforcement. For example, in *Rosado* v. *Wyman*, 397 U.S. 397 (1970), petitioner contended that a provision in New York's Social Services Law was incompatible with a section of the federal Social Security Amendments of 1967, dealing with the Aid to Families with Dependent Children (AFDC) program. The Social Security Act establishes a detailed procedure under which the Secretary of Health, Education, and Welfare reviews state AFDC plans and approves the distribution of federal funds to states whose plans meet federal requirements (*id.* at 406 n.8; see 42 U.S.C. (and Supp. V) 601 *et seq.*). The statute also provides a method whereby the Secretary may cut off funds if he determines, after notice and an opportunity for a hearing, that a subsequent change in a state plan does not comply with federal law (*ibid.*; see 42 U.S.C. (and Supp. V) 604). Notwithstanding the existence of this administrative procedure designed to ensure state adherence to federal AFDC requirements, and despite Congress' failure

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suit, either by the government or by the individual victims of discrimination, would be the only means by which compliance could be enforced. See 45 C.F.R. 80.8(a)(1). See also note 28, *supra*.

specifically to authorize private actions, this Court held that petitioner could maintain a private suit alleging that a change in New York's method of computing AFDC benefits departed from federal standards (397 U.S. at 405-407).

Other decisions also have endorsed a private right of action as a complement to an administrative enforcement scheme. See, *e.g.*, *J. I. Case Co.* v. *Borak*, *supra* (private right of action to enforce SEC proxy rules); *Fitzgerald* v. *Pan American World Airways*, 229 F.2d 499, 501-502 (2d Cir. 1956) (implied private right of action to enforce statute prohibiting discrimination in air transportation, even though statute specifically provided administrative complaint procedure under which Civil Aeronautics Board could issue order compelling future compliance). Indeed, where an allegedly discriminating recipient of federal funds operates under color of state law, several federal courts, including the court of appeals in this case (Pet. App. A-33 to A-34), have approved private litigation as a means of enforcing *Title IX*. See *De La Cruz* v. *Tormey*, No. 76-2791 (9th Cir. Sept. 13, 1978), slip op. 3026-3028; *Alexander* v. *Yale University*, Civ. No. N-77-277 (D. Conn. Dec. 21, 1977), slip op. 8-9. In such a situation, 42 U.S.C. 1983 provides the necessary cause of action even if one assumes *arguendo* that Title IX itself does not (see pages 22-24 and note 16, *supra*).[35]

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[35] Respondent's complaint in *Bakke*, *supra*, did not mention Section 1983 and, accordingly, the opinions in the case did not discuss the role of that statute in the enforcement of

The cases cited in the preceding paragraphs demonstrate that, even where Congress has provided administrative machinery to implement a particular statute and to monitor and compel compliance therewith, courts need not refuse to entertain private suits as an additional enforcement device. Such a refusal is appropriate where implication of a private right of action would be likely to produce results contrary to the legislature's aim (see *SIPC* v. *Barbour*, *supra*) or where the primary purpose to be served by private litigation would be one not contemplated by Congress (see *Cort* v. *Ash*, *supra*; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35, 39-40 (1977)). But where private suits will directly advance the central purpose Congress sought to achieve, they should be permitted unless the legislature has indicated otherwise.[36]

Title VI and other federal laws. The complaint also did not mention 42 U.S.C. 1981, which prohibits any educational institution, public or private, from denying admission to prospective students on the basis of race and which is enforceable by private suit. *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

[36] Private suits under Title IX would raise no difficulties concerning exhaustion of administrative remedies. As Professor Davis has explained, the requirement of exhaustion ordinarily arises only in the context of review of agency action. 3 K. Davis, *Administrative Law Treatise* § 20.01, at 57 (1958). See *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969). Here, petitioner is challenging not an action or determination of a federal department or agency, but rather sex discrimination allegedly practiced by two private universities that receive federal funds. At least two district courts have held that prospective plaintiffs under Title VI of the Civil Rights Act of 1964 must avail themselves of the administrative complaint procedure established by HEW's regulations (see 45 C.F.R.

Turning finally to the fourth question posed in *Cort* v. *Ash*, *supra*, regarding the propriety of an im-

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80.7(b), (c), incorporated by reference in 45 C.F.R. 86.71, the corresponding regulation under Title IX), before they may seek judicial relief. See *Feliciano* v. *Romney*, 363 F. Supp. 656, 672-673 (S.D. N.Y. 1973); *North Philadelphia Community Board* v. *Temple University*, 330 F. Supp. 1107, 1110-1111 (E.D. Pa. 1971). These decisions misapprehend the nature of administrative enforcement under Title VI (and, by implication, Title IX as well). The fund termination procedure provided in Title VI and Title IX is not designed primarily to redress individual grievances of persons who have been subjected to illegal discrimination in federally funded programs. While it is true that such persons may trigger an administrative investigation by filing a complaint with the appropriate funding agency, they may not participate as parties in the investigation or in subsequent enforcement proceedings. A voluntary compliance agreement between the agency and the recipient of funds need not include relief for the specific benefit of the original complainant. In short, an exhaustion requirement is inappropriate under Title VI and Title IX, because petitioner and other persons similarly situated do not have any administrative remedies to exhaust.

Nor would private suits under Title IX raise any primary jurisdiction problem. This Court has explained that the doctrine of primary jurisdiction

> applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. *Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 338 (1963); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 302, 305-306 (1973). Similarly, Professor Davis has said that "the doctrine of primary jurisdiction de-

plied private right of action, enforcement of Title IX is surely not a matter "traditionally relegated to state

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termines whether the court or the agency should make the initial decision." 3 K. Davis, *Administrative Law Treatise* ¶ 19.01, at 2 (1958) (footnote omitted). In private suits under Title IX, there is no reason for courts to stay their hand in deference to the special competence of an administrative agency. Title IX's prohibition against sex discrimination in federally funded education programs does not involve a complex or technical statutory scheme, the enforcement of which requires unusual training or expertise. Courts are highly experienced in adjudicating discrimination complaints and they are well suited to the task. Because of the large number of schools and educational programs covered by Title IX, the administrative response to individual complaints frequently entails considerable delay. Under these circumstances, courts generally need not await a funding agency's views before proceeding to resolve private disputes under Title IX.

This case does not require the Court to determine the proper relationship between administrative and judicial proceedings in every conceivable set of circumstances that may arise under Title IX. In particular, the Court need not address itself to the various questions presented when an administrative investigation is under way or has already been completed at the time a Title IX complaint is filed in district court. The Court need not decide, for example, what weight should be accorded in a judicial proceeding to an earlier administrative finding that a given recipient of federal funds is operating its education programs in compliance with Title IX and applicable regulations. Similarly, the Court need not reach the question whether it might be appropriate in some situations for a district court to defer action on a private Title IX complaint pending completion of an ongoing administrative investigation or pending the outcome of informal negotiations directed toward achieving voluntary compliance with Title IX. These questions and other like them should not be resolved prospectively in a case where they are not presented; they are best left for future consideration as they arise in actual cases. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 154-155 (1967).

law, in an area basically the concern of the States" (422 U.S. at 78). The power exercised in Title IX is a uniquely federal power—the power to control the expenditure of federal funds and to impose conditions on the way those funds may be used by those who receive them. The right conferred by Title IX is a federal right—the right to be free from discrimination in federally funded education programs. Accordingly, federal courts, when called upon to vindicate rights guaranteed by Title IX, have no occasion to defer to state law. Title IX should be enforced according to a uniform federal standard and should not depend on the vagaries of state provisions concerning discrimination on the basis of sex. The fourth criterion listed in *Cort* therefore offers strong support for implication of a private right of action under Title IX.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings under Title IX.

Respectfully submitted.

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